DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 01-0022
Gross Retail Tax—Hauling Charges
Tax Administration—Penalty
For Tax Years 1997-1999

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ISSUES

I. Gross Retail Tax—Taxability of Delivery Charges

Authority: **IC § 6-2.5-2-1**
IC § 6-8.1-5-1(b)

***Cowden & Sons Trucking, Inc. v. Indiana Department of Revenue*, 575 N.E.2d 718 (Ind. Tx. Ct., 1991).**

Taxpayer protests the proposed assessment of Indiana's gross retail tax on hauling charges for contractor/customers lacking standing accounts with sand and gravel quarries.

II. Tax Administration—Penalty

Authority: **IC § 6-8.1-10-2.1(d)** **45 IAC 15-11-2**

Taxpayer protests the imposition of the 10% negligence penalty for tax year 1997.

STATEMENT OF FACTS

Taxpayer, an Indiana corporation, uses its own trucks to transport sand and gravel from quarries to contractor/customers. Some customers have standing accounts with the quarries (hereinafter group A); others do not (hereinafter group B). Group A customers pay the quarries directly for sand and gravel, including applicable gross retail taxes. Taxpayer picks up and delivers the goods. For Group B customers, taxpayer obtains the ordered material from the quarry, which then weighs the truck to determine how much product is being purchased. Taxpayer then pays the price of the product and the gross retail tax. Upon arrival at the group B customer's place of business, taxpayer presents a single invoice to the customer, listing the price of the goods, the gross retail tax on the goods, and a charge for hauling the sand and gravel. The customer pays the total amount of the invoice; taxpayer does not collect and remit gross retail tax on the hauling

charge. Taxpayer does collect and remit gross retail tax on the sand and gravel for Group B deliveries.

The Audit Department audited taxpayer for tax years 1997-1999 and issued a proposed assessment of gross retail tax on the hauling charges for the group B customers. Audit's rationale rests on the lack of an explicit agreement between taxpayer and the Group B customers that title to the goods passed prior to their delivery. Audit also assessed the 10% negligence penalty for tax year 1997 only as taxpayer received refunds for tax years 1998 and 1999. Further information will be added as necessary.

DISCUSSION

Taxpayer protests Audit's proposed assessment of gross retail tax on hauling charges stated separately on invoices taxpayer uses to bill customers who have no standing accounts with sand and gravel quarries (Group B customers). Audit's rationale for the proposed assessment is that the parties did not explicitly agree that title to the goods passed to Group B customers at the quarry.

Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer has met the burden of proof in this case.

Taxpayers selling at retail have a duty to collect and remit sales tax: "(a) [a]n excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. (b) [t]he person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." (IC § 6-2.5-2-1).

Under applicable Indiana case law, the hauling charges are not taxable in the sand and gravel hauling industry. *Cowden & Sons Trucking v. Indiana Department of Revenue*, 575 N.E.2d 718 (Ind. Tx. Ct., 1991, is directly on point. The Tax Court, in upholding the taxpayer's claim for a refund of gross retail taxes paid on hauling charges, stated, " services performed prior to a transfer of property indicate an inextricable transaction wholly subject to sales tax, [citation omitted], and services performed after a transfer of property indicate a divisible transaction in which the sale is taxed, but the services are not." *Cowden*, 575 N.E.2d at 722. The Court found that Cowden, like taxpayer in the instant case, acquired the goods as a favor to a certain class of its customers, and the "hauling services are provided concurrently with the transfer of stone. . .; therefore, the temporal relationship of the two events does not indicate whether the transaction is inextricable and indivisible. . . ." *Id*. at 723. Taxpayer has met its burden in this protest by showing how precisely its business tracks *Cowden*.

FINDING

Taxpayer's protest concerning an alleged failure to collect and remit the state's gross retail tax on hauling charges for one class of contractors/customers lacking standing accounts with quarries is sustained.

II. Tax Administration—Penalty

Taxpayer protests the imposition of the 10% negligence penalty. Taxpayer argues that it had reasonable cause for its failure to pay the appropriate amount of tax due.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer did not collect and remit other gross retail taxes for which they were responsible because of a software error. The error was not discovered until discrepancies appeared in taxpayer's records. Taxpayer exercised the requisite degree of "ordinary business care and prudence." Further, as taxpayer's protest has been sustained on the merits, there is no reason to impose the 10% negligence penalty.

FINDING

Taxpayer's protest concerning the imposition of the 10% negligence penalty is sustained.

DMF/JMM/MR 020307